Supreme Court, U.S.
FILED
MAR 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1080

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

Board of Education of Oklahoma City Public Schools, Independent School District No. 89, Oklahoma County, Oklahoma,
Petitioner,

v.

Robert L. Dowell, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	i
INTEREST OF THE AMICUS CURIAE	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THIS WRIT ...	3

I. The law on the rights and obligations of school boards after a trial court declares a formerly segregated school system "unitary" is unclear.

II. Certain developments necessitate this Court's immediate guidance on the issues regarding unitariness.

A. Demographic changes may require school districts to modify desegregation plans.

B. School districts need clarification as to the effect of a dismissal of a desegregation case in light of the U.S. Department of Justice efforts to reduce its caseload.

III. This Court has an opportunity to resolve the issue of what constitutes a unitary school system and the effect of unitariness at the same time.

ARGUMENT 4

I. THE LAW ON THE RIGHTS AND OBLIGATIONS OF SCHOOL BOARDS AFTER A TRIAL COURT DECLARES A FORMERLY SEGREGATED SCHOOL SYSTEM "UNITARY" IS UNCLEAR.

II. CERTAIN DEVELOPMENTS NECESSITATE THIS COURT'S IMMEDIATE GUIDANCE ON THE ISSUES REGARDING "UNITARINESS."

A. Demographic changes may require school districts to modify desegregation plans.

B. School districts need clarification as to the effect of a dismissal of a segregation case in light of the U.S. Department of Justice efforts to reduce its caseload.

III. THIS COURT HAS AN OPPORTUNITY TO RESOLVE THE ISSUE OF WHAT CONSTITUTES A UNITARY SCHOOL SYSTEM AND DETERMINE THE EFFECT OF A DECLARATION OF UNITARY AT THE SAME TIME.

CONCLUSION..... 31

APPENDIX

TABLE OF AUTHORITIES

CASES: PAGE

Brown v. Board of Education, 347 U.S. 483 (1954)..... 5

Green v. County School Board, 391 U.S. 430 (1968)..... 6, 29

Keyes v. Denver School District No. 1. 463 U.S. 189 (1973)..... 5

Milliken v. Bradley, 433 U.S. 267 (1977)..... 6, 23

Morgan v. Nucci, 831 F.2d 313, 330 (1st Cir. 1987)..... 8, 9

Pitts v. Freeman, 887 F.2d 1438 (11th Cir. 1989).....11, 29

Riddick v. School Bd. of City of Norfolk, 784 F.2d 521 (4th Cir. 1986).....11, 19

Swann v. Charlotte-Mecklenburg Board of Education. 402 U.S. 1 (1971)... 6, 23

U.S. v. Overton, 834 F.2d 11271 (5th Cir. 1987)..... 30

Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982)..... 6, 26

OTHER AUTHORITIES:

Education Week, June 1, 1988 at 18-19..... 25

G. Orfield, F. Monfort, Racial Changes & Desegregation in Large School Districts -- Trends through the 1986-1987 School Year (NSBA Council of Urban Boards of Education, July, 1988).....18, 27

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Counsel for both parties have consented to filing of the within brief.

INTEREST OF THE AMICUS CURIAE

The National School Boards Association (NSBA) is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school board of the Virgin Islands. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

School desegregation continues to be one of the most pressing issues in this country. NSBA submits this brief in the belief that the issues presented in this case must be decided so school districts

can be in a better position to address the continuing problem of racial isolation in the schools. In light of today's economic climate, it is important that every child, regardless of race, color, or national origin, be provided equal opportunities in the public schools of this country. It is also imperative that national rules be established so that the residents of all communities throughout the nation can feel that the school board in their community is subject to the same constitutional standards as the boards in every other community.

STATEMENT OF THE CASE

Amicus incorporates by reference the statement of the case in Petitioner's brief herein.

REASONS FOR GRANTING THIS WRIT

I. The law on the rights and obligations of school boards after a

trial court declares a formerly segregated school system "unitary" is unclear.

II. Demographic changes and federal government actions necessitate this Court's immediate guidance on the issues regarding unitariness.

A. Demographic changes may require school districts to modify desegregation plans.

B. School districts need clarification on the effect of a dismissal of a desegregation case in light of the U.S. Department of Justice efforts to reduce its case load.

III. This Court has an opportunity to resolve the issue of what constitutes a unitary school system and the effect of unitariness at the same time.

ARGUMENT

I. The law on the rights and obligations of school boards after a trial court declares a formerly segregated school system "unitary" is unclear.

There are few matters of public policy that are more important to every member of a community than those involving the desegregation of its public

schools. Therefore, it is imperative that the public perceive that decisions of their local school board and of the federal courts in their jurisdictions are based on the "law of the land." Currently, there is no "law of the land" relative to the rights and obligations of school boards after the trial court determines a formerly segregated system is "unitary."

This Court has ruled that state mandated segregation violates the Constitution, Brown v. Board of Education, 347 U.S. 483 (1954), and has expanded the coverage of the fourteenth amendment to include other forms of de jure segregation. Keyes v. Denver School District No. 1, 463 U.S. 189 (1973). This Court has clarified the obligations of school districts to remedy the effects of de jure segregation: first, by

requiring school boards to take an active role in the desegregation process and not merely grant students the "freedom of choice," Green v. County School Board, 391 U.S. 430 (1968); and second, the Court has ruled on the various methods of desegregation including cross-town busing Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). The Court has clarified the role of the state in the process. Milliken v. Bradley, 433 U.S. 267 (1977). The Court has also ruled in at least one case on the question of whether a state can restrict by statute school district efforts to voluntarily desegregate a school district. Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982). Of course, none of these areas of the law is simple and because of the variety of factual settings in which the legal

issues are presented, nuances have developed with regard to these major legal principles.

But the issues presented to the Court in this case are, indeed, new and perhaps even more difficult than those of the past. The lack of clarity in the law may force school boards to decline to make any changes in their plans, even those that could increase desegregation, because the only safe course now is to do nothing. But, even that course may lead to litigation down the road.

Desegregation decisions are among the most difficult with which school boards must contend. Politically, any course a school board takes is fraught with controversy. Thus, it is important that all the players know the rules of the game.

The National School Boards

Association (NSBA) does not have a position on the issues presented in this case and in the event this Court agrees to hear the case, NSBA will not file a brief on the merits.

As a matter of policy some school board members believe that once segregated by law, a school district should retain forever the burden of proving that any changes it proposes will not adversely affect desegregation. This has been called a "judicial 'no-man's' land." Morgan v. Nucci, 831 F.2d 313, 330 (1st Cir. 1987). The court of appeals in the case at bar adopted this position. It ruled that the issue is merely one of enforcing an injunction. Under the court's ruling, at the time of the hearing to determine whether "unitary" status has been achieved, the trial court must also determine whether

changed circumstances justify dissolution of the injunction. However, the court of appeals' decision implies that even if the injunction is lifted at the time the case is dismissed, the defendant still retains the burden of justifying any change in the plan.

Other school board members believe that once a school district sustains the burden of proving that the school district is "unitary," the school board's obligations cease except to the extent that it is prohibited from intentional discrimination. Under this latter theory, plaintiffs have the burden of proving that changes in the plan are discriminatory. The ruling in Riddick v. School Bd. of City of Norfolk, 784 F.2d 521 (4th Cir. 1986), took this approach.

The court in Morgan v. Nucci, supra approved an arrangement under which the

trial court retained "standby jurisdiction." The first circuit ruled that there is "no legal basis for imposing a formalistic limitation on the broad remedial powers of a court of equity" by giving it only two options "keeping a case on its 'active docket' or total disengagement."

Undoubtedly a number of refinements need to be made in the law regarding the first stage of desegregation, i.e., the stage leading up to and including the approval of the desegregation plan(s). But most districts that have been under desegregation plans for a number of years are now in the second stage for which this Court has not developed the major legal principles.

Amicus submits that districts urgently need the answers to three questions: First, when does the duty of

a formerly de jure segregated school district to actively remedy segregation end? The decision in the instant case did not attempt to resolve this threshold issue of when a district becomes "unitary." Other cases have addressed the issue. See, e.g., Pitts v. Freeman, 887 F.2d 1438 (11th Cir. 1989). The second question is when, if ever, formerly de jure segregated school districts regain the right to make student assignment decisions without regard to the effect on the court-ordered desegregation plan? The court in Riddick v. School Bd. of City of Norfolk, supra ruled that once the district is "unitary," at that time it regains the right to assign students without regard to the effect on the desegregation plan. It is unclear whether the decision in the instant case answered this question. It

could be argued -- as the dissent in the case did argue -- that the court of appeals in the instant case believes the district has a continuing obligation to justify any changes in the plan forever. The court of appeals argued that the burden to justify changes continues until the injunction is dissolved.

The court of appeals' discussion on the injunction issue, however, is simplistic because the court's criteria for dissolution of the injunction places the burden of proof on the school district to show that changes in the plan will not have a discriminatory effect. If in this case the injunction had been lifted at the same time as the case was dismissed, the trial court would not have had the opportunity to rule on the new student asssignment plan because it was not adopted until eight years later.

Apparently, the court of appeals believes that the injunction cannot be lifted in the abstract. It must be lifted in the context of an attempt to change the desegregation plan. Thus, the trial court in this case would not have had the power to dissolve the injunction at the time it declared the district "unitary" because no changes in the plan were proposed at that time.

If a court must rule on the appropriateness of each change, that places the district under the jurisdiction of the court in perpetuity, at least with regard to decisions that affect school desegregation. As noted earlier, Amicus is not stating a position as to whether that standard is correct. But, it is imperative that all school districts in a similar position to that of Oklahoma City know what the standard

is and that it applies to all similarly situated school districts in the country.

What Amicus seeks is stability. If school districts must remain under the jurisdiction of the courts, so be it. At least then each school board knows that its policy considerations must be formulated with this Court's standards in mind. If the burden of proof cannot be met with regard to a neighborhood plan, then school districts will have to seek other ways to meet the challenges posed by increasing minority populations. On the other hand, if this Court determines that the Tenth Circuit Court of Appeals was wrong and the Fourth Circuit was right, school boards whose districts have been declared to be "unitary" will know that they can now operate their districts without court oversight.

As noted earlier, whatever decision

a school board makes in this sensitive area is going to be the subject of controversy. Decision-making is even more difficult if the law is unclear. Where the law is clear and school boards operate within the confines of the law, history has shown that desegregation works. Now that formerly segregated school districts are administered by whole new sets of personnel, there is reason to believe that some stability in the law will lead to stability in desegregation efforts.

II. Demographic changes and government actions necessitate this Court's immediate guidance on the issues regarding "unitariness."

One could argue that the Court should postpone a decision on the issues in this case until additional cases have made their way through the courts. However, because of the federal

government's recent action in attempting to reduce its desegregation case load and because demographic changes are altering the complexion of the schools, school districts are between a rock and a hard place. They must make decisions now on whether to seek "unitary" status. In order to do that they must know what effect a declaration of "unitary" will have.

A. Demographic changes may require school districts to modify desegregation plans.

NSBA recently conducted a survey of the members of its Council of Urban Boards of Education (CUBE), to which 74% of the members responded. The districts that comprise CUBE are our nation's largest districts, educating more than four million children in America's urban public schools, 10% of the total public school student enrollment. The survey

asked the districts a number of questions about desegregation. In the school systems responding to the survey, non-white students accounted for two-thirds of all students. Only three of the fifty-two school districts surveyed never had a desegregation plan. Forty districts are currently involved in desegregation efforts, fifteen of which are operating under plans different from those originally ordered. As demographics change school districts are responding by seeking changes in court orders or orders declaring the district unitary. Others are waiting for additional guidance from the courts.

However, school districts of this size cannot remain static. They must change as circumstances -- such as demographics -- change. The white population is decreasing and the "school

enrollment statistics are telling us about a new, profoundly multi-racial society that neither our political leaders, research community, nor media have yet fully recognized. Teachers and school officials are dealing with a society that has changed dramatically since the time of our grandparents and that is continuing to change very rapidly." G. Orfield, F. Monfort Racial Change & Desegregation in Large School Districts -- Trends through the 1986-1987 School Year (NSBA Council of Urban Boards of Education, July, 1988) 2. See Appendix for an analysis of racial changes in student populations in 60 largest U.S. cities. Data in the Appendix is derived from G. Orfield, Racial Change & Desegregation in Large School Districts -- Trends through the 1986-1987 School Year, supra at 4-9.

Boards must make changes and cannot wait much longer for rulings of this Court. Yet, given the intensity of community feelings on the issue of desegregation, it is unfair to force school boards to make policy decisions that affect the entire community without a better picture of the legal framework in which they must operate. If the board decides to return all or part of its district to a neighborhood school system -- opponents point to Oklahoma City to argue that the action is illegal. If the board decides to retain its desegregation plan and make changes to reduce racial isolation, opponents point to Riddick to contend that such changes are unnecessary under the law.

Unfortunately, when the law is unclear, the debate centers on prognostications as to what the Supreme

Court will or will not do rather than on policy issues such as whether "white flight" is the cause of racial isolation in Oklahoma City, De Kalb, Georgia or anywhere else or is it caused by a decrease in the white birth rate or by a continuing movement to the suburbs by both whites and minorities? If the cause is white flight, will a return to neighborhood schools reduce that flight; if not, what other means exist for reducing the current racial isolation?

All of these issues should be studied in the community in an environment where the basic legal principles are settled. Citizens, courts, and the federal government have argued over the years that local school districts should be left to themselves to effect the management decisions that result in the desegregation of their

schools. Who is in a better position than the locally selected and accountable school board to call in the members of the community to discuss these issues that affect all of the community? Who is in a better position to organize citizen involvement in developing alternative assignment plans? Who is in a better position to ensure that teachers and administrators are trained to deal with the myriad problems entailed in the development of an effective desegregation effort?

Most importantly, who better than the school board is in a position to ensure that the desegregation effort works and is not merely an agonizing and futile exercise? Desegregation plans and plans handled voluntarily and cooperatively, with the full participation of the local school board,

administrators, teachers and community leaders, are invested with the potent opportunity of ensuring that the community understands why the action is being taken and is given reason to believe that it has contributed to the plan and stands to lose if the plan fails. A plan developed with the cloud of probable federal court intervention has much less chance of working.

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process...local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation and a healthy competition for education excellence."

Milliken v. Bradley, 418 U.S. 717, 741-42 (1974).

Citizens in the school districts which have been subject to desegregation orders are urging their school boards to play exactly what this Court has indicated is their traditional role and to take control over the educational process. There also continues to be a demand by parents for neighborhood schools. This Court has indicated some support for neighborhood schools. "All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes." Swann, 402 U.S. at 28. Tne key is determining what is "equal." In the absence of guidance from this Court as to the parameters under which formerly de jure segegated systems

must operate, school districts remain in the dark as to who has the final control over student assignment decisions -- the board or the courts.

Amicus urges this Court to tackle these difficult issues now rather than waiting for additional appeals' court rulings on the issue. School boards need guidance now and the delay could cause needless harm to the educational process in those communities where the board is delaying action because of a fear of reversal or is taking action only to be reversed after the action has been taken. Unlike other cases the acts or failures to act in a desegregation case affects an entire generation of young people. It affects the entire community and their view of the educational system.

B. School districts need clarification as to the effect of a dismissal of a segregation case in light of the U.S. Department of

Justice's efforts to reduce its case load.

In the Spring of 1988 the U.S. Department of Justice announced that it was planning to seek dismissal of more than 200 school district desegregation cases where the districts have fully complied with court-ordered plans for a minimum of three years. Education Week June 1, 1988, at 18-19. From the community standpoint it is, of course, preferable to be relieved from the jurisdiction of the court so that the board can make decisions based on educational needs of all children and be relieved of administrative tasks such as preparing reports to the court and the plaintiffs. Arguably, it is also in the interest of the trial courts to be relieved from the duty of routinely deciding all manner of issues relating to

student assignment and other matters included in the desegregation order.

On the other hand, the process of achieving a court order dismissing the case and declaring the district "unitary," is expensive, can cause community anxiety and unrest and can be disruptive of the educational process. For these reasons, left to their own devices, many districts might opt to remain under court order. But as long as the Department of Justice continues to seek dismissals of these cases, the districts are forced to join in the Department's appeal to the court to dismiss the case. But -- if the effect of dismissal and achieving "unitary" status does not relieve the district of the court's jurisdiction, there seems little point in seeking that dismissal. Therefore, school districts need

clarification from this Court as to the effect of the dismissal of a desegregation case.

As part of the effort to "close down" its caseload, the Reagan Administration encouraged districts to dismantle their plans and adopt neighborhood student assignment plans. That Administration dropped some Justice Department desegregation lawsuits begun in the previous Administration and changed its position in cases such as that involving the validity of the Washington State statute which prohibited voluntary busing for desegregation. This "kind of dramatic, high visibility leadership" has resulted in both school officials and members of the public assuming that the era of busing and court-ordered desegregation is over. G. Orfield, Racial Change & Desegregation in

Large School Districts -- Trends through the 1986-1987 School Year, supra.

It is unfair to the hundreds of school districts who are under court-ordered desegregation plans for the federal government to lead them to believe that they can freely go into court and be relieved of all obligations to justify future student assignment actions that have a segregative effect -- if, indeed, this Court is going to rule at some future time that school boards are not free to take such action.

It is counterproductive to wait until after the school district has reassigned its students -- with the concomitant public unrest that such action always causes -- to decide that the action taken must be subjected to a degree of scrutiny that the district may not be in a position to meet. Again,

whether such a degree of scrutiny is justified is not the point. The point is that districts are entitled to know the standards now.

III. This Court has an opportunity to resolve the issue of what constitutes a unitary school system and determine the effect of a declaration of unitary at the same time.

Amicus further submits that the timing is right for this Court's intervention into these issues for another reason. A case is, or shortly will be, before the Court on a petition for certiorari which raises the issue of when a district is "unitary." In the case of Pitts v. Freeman, the Court of Appeals for the Eleventh Circuit held that a district has a continuing duty to desegregate its student body until such time as it has reached "unitary" status in all six Green factors, i.e., student assignment, faculty, staff,

transportation, extracurricular activities and facilities. Green, 391 U.S. at 435.

The questions of first, when a district is unitary and second, whether the district is then free to change in the plan are very closely intertwined. "The elements of a violation and who must bear the burden of their proof are not conceptually distinct from unitary status but are its components; indeed, the contrary assertion is dissembling." U.S. v. Overton, 834 F.2d 11271 (5th Cir. 1987).

Since it is improbable that a single case will raise both the threshold issue of when a district becomes "unitary" and the companion issue of the effect of a declaration of "unitary," this would seem an appropriate time for the Court to review both issues. Since it is

difficult to address one issue without also addressing the other, it may be easier for the Court to resolve both issues with the benefit of the arguments of the parties to both cases.

IV. Conclusion

Amicus submits that because of the inconstancy of student demographics and because of the Department of Justice's action in seeking to dismiss their desegregation case load, school districts need advice from this Court on the second stage desegregation issues of the nature and effect of a declaration of "unitary" status. Because desegregation activities are so compelling, and because school districts are being forced to make decisions even in absence of guidance from this Court, it can almost be said that the content of this Court's rulings on these issues is less important than

the need for the rulings to come now.

Respectfully submitted,

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APPENDIX

CHANGES IN STUDENT ENROLLMENT IN LARGEST SCHOOL DISTRICTS 1967-1986

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
New York	-155145	-14	-26	8
Los Angeles	-65246	-10	-37	-4
Chicago	-147231	-26	-27	5
Dade Co., FL (Miami)	23679	11	-40	9
Houston ISD	-61886	-24	-37	10
Philadelphia	-92768	-33	-15	5
Detroit	-133331	-46	-32	31
Dallas ISD	-24330	-15	-42	19
Fairfax Co., VA	23955	22	-19	6
Broward Co., FL	37949	40	-9	2

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
Baltimore	-73916	-38	-17	15
Hillsborough Co., FL	20732	22	-11	1
Memphis	-10314	-8	-24	24
San Diego	-10680	-9	-32	7
Prince Geo. Co., MD	-33476	-25	-55	48
Duval Co., FL	-19143	-16	-12	8
Montgomery Co., MD	-16858	-15	-27	11
Clark Co., NV	32056	51	-11	3

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
Jefferson Co., KY	-44264	-32	-27	26
Milwaukee	-37936	-30	-37	29
Pinellas Co., FL	14228	19	-4	2
Palm Beach Co., FL	25600	43	-9	-1
Washington, DC	-64281	-43	-4	-1
New Orleans	-24446	-22	-26	21
Orange Co., FL	11325	16	-16	8

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
Albuquerque	936	1	-6	1
Baltimore Co., MD	-41780	-35	-14	10
Cleveland	-76202	-50	-18	13
Charlotte	-5300	-7	-13	11
Salt Lake	35117	94		
DeKalb Co., GA	-5891	-8	-46	42
Mobile	-8998	-12	-4	3
San Francisco	-32395	-33	-27	-5
Ft. Worth	-17080	-20	-32	11
Atlanta	-47192	-41	-34	33

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
Columbus	-41843	-39	-21	19
Long Beach	-8019	-11	-48	11
Anne Arundel Co., MD	1807	3	-3	0
Virginia Beach City	24010	62	-9	3
Nashville	-30833	-33	-13	10
Cobb Co., GA	23271	60	-4	2
El Paso ISD	2139	4	-20	2
Jordan, UT	40955	204	-5	0
Austin ISD	21255	54	-34	1
Denver	-34705	-37	-29	8

DISTRICT	TOTAL STUDENT POPULATION CHANGES		WHITE/BLACK CHANGES	
	TOTAL CHANGE	TOTAL % CHANGE	% CHANGE WHITE	% CHANGE BLACK
Boston	-31442	-34	-47	21
Polk Co., FL	8225	16	-2	-1
Fresno USD	-4557	-7	-28	2
Wake Co., NC	33555	137	NA	NA
Jefferson Parish, LA	2218	4	NA	NA
Tucson	3453	7	-11	1
Newark	-25151	-32	-12	-6
Cincinnati	-34993	-40	-19	19
Caddo Parish, LA	-6017	-10	NA	NA
Portland	-27025	-34	-16	7
Oakland USD	-17354	-25	-23	10
Greenville	-4868	-9		
Indianapolis	-57989	-53		
TOTAL	**-1188420**	**-15**		
AVERAGE	**-20490**	**-01.8**		